No. 04-55838

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
RAYMOND P. NOVAK,	)
	)
Defendant-Appellee.	)
	)
	)

APPELLANT'S BRIEF REGARDING REHEARING EN BANC

APPEAL FROM

THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLANT'S BRIEF REGARDING COURT'S MAY 17, 2006 ORDER REQUESTING BRIEFING ON REHEARING EN BANC

I. ISSUE PRESENTED

Whether the Court's decision in United States v. Novak, 441 F.3d 819 (9th Cir. 2006), determining that, pursuant to the Mandatory Victim Restitution Act ("MVRA"), a criminal judgment debtor's pension assets are subject to execution to satisfy his restitution obligation should be reheard en banc.

II. SUMMARY STATEMENT OF THE CASE

Defendant Raymond Novak ("Novak") pleaded guilty to charges of conspiracy to transport stolen goods in violation of 18 U.S.C. § 371 and filing false income tax returns in violation of 26 U.S.C. § 7206. The district court sentenced him to pay restitution in the amount of $3,360,051.67 to the victim of the

offense, Nestle USA, Inc., pursuant to the MVRA. Novak, 441 F.3d at 824. Under the statute, the court is required to order a defendant convicted of an offense that involves loss of property to pay restitution in the full amount of the victim's losses. Novak did not appeal the restitution order, and it is now final.

As a result of his prior employment, Novak had a pension account with a value of $142,245.11. Id. at 820. The United States obtained a writ of garnishment for the account, but the district court quashed the writ. This Court reversed the order quashing the writ, holding that, pursuant to the MVRA, the United States may enforce a criminal restitution judgment by garnishing a criminal judgment debtor's ERISA-qualified pension plan assets.

On May 17, 2006, the Court ordered that the parties file, within 21 days, simultaneous briefs "setting forth their respective positions on whether this matter should be reheard en banc." Plaintiff-appellant respectfully contends that rehearing en banc is not necessary in this case.

III. STANDARD FOR EN BANC REVIEW

F.R.A.P. 35(a) provides in part as follows:

> An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
> (2) the proceeding involves a question of exceptional importance.

F.R.A.P. 35(a).

IV. ARGUMENT: REHEARING EN BANC IS NOT NECESSARY IN THIS CASE.

A. The Court's Opinion Properly Construed the Applicable Statutes

This Court's opinion determined the important question presented by this case: whether the convicted defendant or the victim of the offense is entitled to the benefit of the defendant's pension plan assets. Because the Court properly concluded that, under the MVRA, the rights of the victim supercede those of a convicted criminal defendant, no en banc consideration of the victim supercede those of a convicted criminal defendant, no en banc consideration of this issue is warranted.

i. The Anti-Alienation Provisions of ERISA

This Court examined the MVRA, as enacted in 1996, and properly concluded that the MVRA contains an explicit exception to the anti-alienation provisions of ERISA. As a result of the Congressional directive contained in the MVRA, the rights of a victim to recovery of their loss are superior to the rights of a convicted defendant to enjoy the benefits of an ERISA-qualified pension account.

When Congress adopted the Employee Retirement Income Security Act ("ERISA") in 1974, it required that ERISA-governed pension plans "provide that benefits provided under the plan may not be assigned or alienated." ERISA, § 206(d), 29 U.S.C.

§ 1056(d)(1). The purpose of the anti-alienation provisions of ERISA is to protect beneficiaries from their own improvidence in dealing with third parties, and to ensure that beneficiaries will receive the income due to them on retirement. See, e.g., Amer. Tel. & Tel. v. Merry, 592 F.2d 118, 124 (2d Cir. 1979). As a result of the anti-alienation provisions of ERISA, pension assets are not subject to execution to satisfy a civil debt owed by the pension beneficiary.

In Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990), the Supreme Court determined that ERISA-qualified pension assets are not subject to execution to satisfy a civil judgment. Guidry pleaded guilty to embezzling funds from his union. The union sued him and obtained a judgment for $275,000. The court imposed a constructive trust on the assets of the pension plan that constituted Guidry's pension benefits. The Supreme Court reversed, refusing to find "any generalized exception - either for employee malfeasance or for criminal misconduct - to ERISA's prohibition on the assignment or alienation of pension benefits." 493 U.S. at 376. The Court left it to Congress to identify specific exceptions. That is precisely what Congress did in enacting the MVRA in 1996. See Novak, 441 F.3d at 822-23.[1]

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1. ERISA itself contains a savings provision. The Act states that "[n]othing in [the subchapter that includes the anti-alienation provision] shall be construed to alter, amend, modify,

ii. Enforcement of Tax Debts and Criminal Restitution Orders Against ERISA-Qualified Pension Assets

While the anti-alienation provisions of ERISA shield pension assets from most collection efforts, such pension funds are subject to garnishment to satisfy federal tax debts. United States v. McIntyre, 222 F.3d 655 (9th Cir. 2000) (IRS may levy on taxpayer's ERISA-qualified pension fund). "We think it is plain that the IRS's authority to proceed against a delinquent taxpayer's interest in benefits from an ERISA-governed plan is not constrained by ERISA's anti-alienation provision." McIntyre, 222 F.3d at 659. Two other Circuits have similarly held that ERISA's anti-alienation provision "did not affect the IRS's authority to levy against pension funds under the collection provisions of the Internal Revenue Code." United States v. Sawaf, 74 F.3d 119, 124 (6th Cir. 1996); accord Shanbaum v. United States, 32 F.3d 180 (5th Cir. 1994). Furthermore, Treasury Regulations make clear that ERISA pension plan assets are not exempt from a federal tax levy. 26 C.F.R. 1.401(a)-13.

Thus, as the Court's opinion in this case noted, there is no remaining question but that Novak's ERISA-qualified pension

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invalidate, impair, or supersede any law of the United States." 29 U.S.C. 1144(a). See also United States v. Sawaf, 74 F.3d 119, 124 (6th Cir. 1996) (noting that ERISA's savings clause, 29 U.S.C. 1144(a), opens the door to exceptions to its anti-alienation provision).

assets would have been subject to garnishment for tax liabilities. 441 F.3d at 823. As the panel also determined, it follows that those assets should also be subject to garnishment to pay his criminal restitution judgment.[2]

As this Court noted, 18 U.S.C. § 3613(a) specifies the property of a criminal judgment debtor that is exempt from execution, including some of the assets that are exempt under the Internal Revenue Code, 26 U.S.C. § 6334(a). Id. at 823. Section 3613(a) provides that a criminal judgment may be enforced against all of a debtor's non-exempt property "[n]otwithstanding any other Federal law . . . ." 18 U.S.C. § 3613(a)(West 2000). That is, restitution to victims of crime was "elevated . . . to the

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2. A criminal restitution is enforceable, through a somewhat circuitous statutory route, in the same way as a tax lien. Novak's restitution order was issued pursuant to the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. 3663A. That statute calls for enforcement of such orders in accordance with section 3664." 18 U.S.C. § 3663A(d). Section 3664 allows for enforcement of criminal restitution orders in the manner provided for in * * * subchapter B of chapter 229 of this title." 18 U.S.C. § 3664(m)(1)(A)(I). Subchapter B of chapter 229 is codified at 18 U.S.C. § 3611-3615 and governs the enforcement of criminal fines. Section 3613(a) states that criminal fines "may be enforced against all property or rights to property of the person fined," subject to several exceptions that everyone agrees are not applicable to this case. 18 U.S.C. § 3613(a) (emphasis added). Finally, section 3613 (c) states that orders of restitution imposed pursuant to 3663A are "liens in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986." 18 U.S.C. § 3613 (c).

position enjoyed by the Internal Revenue Service in the collection of its unpaid tax demands." Id. at 823.

iii. This Court Properly Determined That The Exemption Provisions of § 3613(a) Prevail Over The Anti-Alienation Provisions of ERISA

In adopting the exemption provisions of 18 U.S.C. § 3613(a), Congress specifically stated that its provisions prevail over all other federal laws. 18 U.S.C. § 3613(a). A criminal judgment may be enforced against all property of the debtor except for property listed as exempt in section 3613(a) "[n]otwithstanding any other Federal law . . . ." This Court properly determined that in this provision of the criminal code, "Congress - as the Supreme Court in Guidry indicated that it could - has created a statutory exception to ERISA's anti-alienation provision." Id. at 824. "Other federal law" certainly includes ERISA, and Congress could not have been more plain in its intention to supersede all other Federal laws that might protect a criminal debtor from execution to satisfy the judgment against him.[3] Thus, since Novak's ERISA assets would be subject to garnishment

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3. The dissent maintains that Guidry and Jackson "require Congress to issue a clear statement of its intent to abrogate ERISA." 441 F.3d at 825 (Fletcher, B., dissenting). According to this view, the "notwithstanding any other Federal law" provision of § 3613(a) is not sufficiently clear to encompass ERISA. However, this does not explain how the clear statutory elevation of enforcement of restitution orders to the level of tax lien enforcement in § 3613(a), and this Court's unequivocal decision in McIntyre, 222 F.3d at 660 (that ERISA funds are subject to tax lien enforcement), can be squared with a supposed lack of clarity by Congress.

for tax liabilities and there is no exception from execution for this type of ERISA asset, Novak's assets are properly subject to garnishment to satisfy his criminal debt as well.

B. The Court's Decision Is Consistent With the Conclusions of All Other Courts That Have Considered the Issue

Although the Court's published decision constituted the first circuit precedent concerning the ability of the United States to satisfy criminal restitution judgments from ERISA-qualified pension assets, it is consistent with all the lower courts that have considered the issue. In United States v. Rice, 196 F. Supp. 2d 1196 (N. D. Ok. 2002), the court concluded that the pension assets were subject to execution to satisfy the criminal debt. The court determined that

> [t]he language of § 3613 and its legislative history make it clear that the government may enforce a criminal fine rendered in its favor against all of the Defendant's property except that property which would be exempt from a levy for the payment of federal income taxes. Subsection (a) specifically states that notwithstanding "any" other federal law, a criminal fine may be enforced against all of the defendant's property, including pension benefits.

Rice, 196 F. Supp. 2d at 1199. The court also noted that pursuant to § 3613 (c), a criminal fine is to be treated the same as a lien for the payment of federal taxes. Because none of the IRS exemptions incorporated into section 3613(a)(1) provide an exemption for ERISA-qualified pension benefits, the United States is entitled to execute on such assets to satisfy a criminal judgment. Id. at 1200.

In United States v. Tyson, 242 F. Supp. 2d 469 (E.D. Mich. 2003), the defendant was convicted of mail theft and ordered to pay restitution to the victims. The United States garnished defendant's pension with Ford Motor Company Retirement Trust, which objected to the garnishment. The court overruled the objections to the magistrate judge's report to the district court holding that "18 U.S.C. § 3613 is an express statutory exception to the anti-alienation provision of ERISA found at 29 U.S.C. § 1056(d)(1) as well as the corresponding provision of the Internal Revenue Code found at 26 U.S.C. § 401(13)(A)." See also United States v. James, 312 F.Supp. 2d 804, 805-806 (E.D.Va. 2004) ("Because § 3613 makes clear that restitution orders in favor of the United States are to be treated like tax liabilities, it appears that, like delinquent taxpayers, criminal defendants owing restitution to the government cannot protect their pension benefits from being used to satisfy their monetary obligations to the government."); United States v. Garcia, 2003 WL 22594362 (D.Kan. Nov. 6, 2003) ("[I]t is not only the text of Section 3613(a) which leads to the conclusion that the general anti-alienation protection accorded qualified plans under the tax code and ERISA does not insulate such plans from execution of unpaid criminal fines . . . . That is, the anti-alienation protection does not protect a qualified plan from the enforcement of federal tax levies and collection on a judgment for unpaid

taxes."); United States v. Sowada, 2003 WL 22902613 (E. D. La. Dec. 8, 2003) ("This Court agrees with those district courts that have concluded that the United States can garnish ERISA funds for satisfaction of criminal fines and penalties. To hold otherwise would give convicted criminal defendants greater rights than those of citizens who owe a tax debt to the government.").

There are no reported decisions that reach a conclusion contrary to the panel's holding in this case.

C. En Banc Review Is Not Necessary To Maintain Uniformity Of Decisions

The Court's decision is not contrary to this Court's holding in United States v. Jackson, 229 F.3d 1223, 1224 (9th Cir. 2000), or to the Supreme Court's decision in Guidry, supra. In Jackson, the defendant was sentenced to pay restitution under the provisions of the Victim-Witness Protection Act ("VWPA"), 18 U.S.C. § 3663 (West 2000). That statute required that the court, in setting a restitution judgment, consider the defendant's ability to pay restitution in the future. The district court set the defendant's restitution obligation based in part on his ownership of pension assets, a ruling that effectively would have required the defendant to cash out his pension assets to pay restitution. In a short opinion, this Court reversed, citing ERISA's anti-alienation provision and quoting the statement in Guidry that there is no generalized equitable exception to ERISA's prohibition on the alienation of pension benefits. This

Court held "that unless the crime involved the EIRSA pension plan in question and restitution is ordered to that plan, undistributed funds are not available for such payment." Jackson, 229 F.3d at 1224.

Despite the apparently expansive language, the Jackson decision addressed the calculation of the restitution order itself and a sentencing court's equitable powers to garnish ERISA pension plan assets, not the enforcement of the final restitution order pursuant to statute. Id. ("This case presents the question whether, as part of a criminal sentence, a district court may order that undistributed funds from a pension plan covered by [ERISA] be used to make immediate payment of restitution.") As the district court noted in Rice, in Jackson, "[the Ninth Circuit] never discusses the impact of 18 U.S.C. § 3613 on ERISA . . . . It was not until the case was appealed to the Ninth Circuit that defendant argued for the first time that ERISA's anti-alienation provision applied at all. Id. at 1225." Rice, 196 F. Supp. 2d at 1202.

In fact, Jackson makes no reference whatsoever to 18 U.S.C. 3613, 3663, 3663A, or 3664. It appears that the parties and the Court in Jackson were not aware of those provisions when considering the facts in Jackson. There was no reason to discuss, and there was no discussion of, the enforcement of a

restitution judgment, or any of the statutory provisions for garnishment.

In Jackson, this Court relied heavily on Guidry, which "ruled out 'any generalized equitable exception . . . to ERISA's prohibition on the assignment or alienation of pension benefits." Jackson, 229 F.3d at 1225, quoting Guidry, 493 U.S. at 376 (ellipses added). Nothing in Guidry prevents garnishment of ERISA pension plan assets to satisfy a tax liability. So, too, nothing in the 1990 decision in Guidry prevents the use of ERISA pension plan assets to satisfy a criminal restitution order pursuant to the specific statutory provision of the MVRA enacted in 1996.

The language in Guidry refusing to use the Court's equitable powers to subject ERISA funds to garnishment only addressed equitable exceptions to ERISA's anti-alienation provisions. The Court specifically recognized that "[i]f exceptions to this policy are to be made, it is for Congress to undertake that task." Guidry, 493 U.S. at 376. The lower courts addressing that specific question have consistently concluded that "§3613 is the type of 'considered congressional policy choice' which was lacking in Guidry; it is a Congressionally created exception to ERISA's anti-alienation provision." Id. at 1201; see also Tyson, 242 F. Supp. 2d at 472 (quoting Rice, 196 F. Supp. 2d at 1260; James, 312 F. Supp. 2d at 805 (finding that 18 U.S.C. § 3613(a)

"operates as a congressionally created exception to the anti-alienation provision in 29 U.S.C. § 1056(d)").

D. En Banc Review Is Not Required To Address The Important Issue Presented By This Case

F.R.A.P. 35(a)(2) authorizes en banc review in proceedings that involve question of exceptional importance. Appellant believes that the issue of exceptional importance in this case is the statutorily-mandated compensation of crime victims, and that en banc review is not necessary to serve this interest.

In adopting the MVRA in 1996, Congress eliminated the requirement that a restitution order be based on a defendant's ability to pay. The purpose of the act was to strengthen the rights of crime victims to recover restitution. Congress directed the Attorney General to aggressively enforce restitution orders with the "inten[t] that the Department [of Justice would] commit the resources necessary to ensure that the rights of victims are enforced." Victim Restitution Act of 1995, Pub.L. No. 104-132, at 23, 1996 U.S.C.C.A.N. 924, 936. The legislative history further shows that the MVRA was drafted to "strengthen the ability of the Government to collect" criminal restitution; it "consolidat[ed] the procedures for the collection of unpaid restitution with existing procedures for the [Government's] collection of unpaid fines" and simultaneously "strengthen[ed] these procedures." Id. at 13-14, 22, 1996 U.S.C.C.A.N. at 926-27. In adopting the MVRA, Congress plainly intended that

criminals be required to compensate crime victims from all available sources.

The Court's opinion in this case properly places the rights of crime victims to compensation above the rights of convicted criminals to maintain their pension assets. The Court properly resolved the important question presented by this case and, thus, no further review is necessary.

V. CONCLUSION

For the foregoing reasons, en banc review of the panel's decision in this case is not necessary.

DATED: June 7, 2006.

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APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CV 03-6706 CBM

APPELLEE'S BRIEF FOR REHEARING EN BANC OF DECISION FILED MARCH 23, 2006 (Pursuant to Order Filed May 17, 2006)

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STATEMENT OF COUNSEL

In the judgment of counsel for the Appellee herein, this petition serves the purposes for a rehearing en banc in the following respects:

1. The majority sidesteps our Supreme Court's holding in *Guidry v. Sheet Metal Workers Nat'l Pension Fund* 493 U.S. 365 (1990), requirement of a clear congressional statement to carve out exceptions to ERISA's anti-alienation provision and sets up irreconcilable conflict with this court's decision in *United States v. Jackson*, 229 F.3d 1223 (9th Cir. 2000).

2. The majority does not adequately discuss how it's opinion can be reconciled with our Supreme Court's holding in *Guidry*, and this Court's decision in *Jackson*.

3. The majority fails to acknowledge that the statutory scheme suggested by the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. §§ 3663A and 3616 and does not evidence a required clear statement to abrogate ERISA's anti-alienation provision. Such requirement is a matter of national importance.

4. Contrary to the directive of our Supreme Court in *Guidry,* the majority opinion represents a judicially created exception to a congressionally required act.

For the foregoing reasons, counsel respectfully submits that the majority opinion be made the subject of a rehearing en banc.

ARGUMENT

If allowed to stand, the majority opinion will create a judicial exception to a congressionally required act. Appellee submits that this Court should grant the within petition and adopt the position set forth in the dissenting opinion in order to reconcile the decisions of this Court.

I. THE MAJORITY SIDESTEPS OUR SUPREME COURT'S HOLDING IN *GUIDRY.*

The majority holds that the MVRA, 18 U.S.C. §3663A, in conjunction with 18 U.S.C. §3613, constitutes a statutory exception to ERISA's anti-alienation provision. However, *Guidry*, as well as the 9th Circuit decision in *Jackson* require that Congress issue a clear statement of its intent to abrogate ERISA. Neither the MVRA nor 18 U.S.C. §3613 contains such directive.

Section 206(d) of ERISA provides that the benefits under its pension plans "may not be assigned or alienated." *See* 29 U.S.C. §1056(d)(l). *Guidry* takes an uncompromising approach, finding no exceptions to ERISA's anti-alienation provision without a clear directive from Congress. "If exceptions to this policy are to be made, it is for Congress to undertake that task." *Guidry*, 493 U.S. at 346. Congress — not courts — determine the exceptions to the statutory bar.[1]

II. THE MAJORITY DOES NOT ADEQUATELY DISCUSS HOW IT'S OPINION CAN BE RECONCILED WITH *GUIDRY* AND *JACKSON.*

In *Jackson*, this Court reversed a district court decision that ordered a defendant to pay immediate restitution from the proceeds of his undistributed ERISA pension plan. This Court followed *Guidry*'s unequivocal rejection of any generalized equitable exception to

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[1] The *Guidry* decision honors Congress' "considered . . . policy choice . . . to safeguard a stream of income for pensioners . . . even if that decision prevents others from securing relief for the wrongs done them." *Id.* at 376. And it notes that those social policy objectives "sometimes take [ ] precedence over the desire to do equity between particular parties." *Id.* at 376.

ERISA's anti-alienation provision, holding that no exception to ERISA's anti-alienation provision shall lie unless Congress says so.

The few exceptions to this rule are clearly indicated within the statutory text. For instance, § 104(a) of the Retirement Equity Act of 1984, *see* 29 U.S.C. § 1056(d)(3), clearly mandates that the anti-alienation provision does not apply to a qualified domestic relations order. *See Guidry*, 493 U.S. at 376 & n.18. ERISA contains an explicit, narrow exception to the anti alienation provision in cases of crimes against the pension plan itself. *See* 29 U.S.C. § 1056(d)(4)(A)(1) (noting that the anti-alienation provision in § 1056(d)(1) "shall not apply . . . if . . . the order or requirement to pay arises . . . under a judgment of conviction for a crime involving such plan . . . ."); *see also Jackson*, 229 F.3d at 1225.

The majority cites a handful of out-of-circuit precedents supporting its conclusion that §3613 constitutes an exception to the anti-alienation provision. However, interpretations of courts in sister jurisdictions are not controlling, especially where, as here, *Jackson* dictates the contrary outcome. *See United States v. Martinez*, 967 F.2d 1343, 1347 (9th Cir. 1992) ("we are obliged to follow the law of our circuit over inconsistent law from other circuits"). Unless and until this Court reviews that decision en banc, it remains good law, *see United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005), and the majority is obligated to apply it.

III. THE STATUTORY SCHEME SUGGESTED BY THE MVRA DOES NOT EVIDENCE THE REQUIRED CLEAR STATEMENT TO ABROGATE ERISA'S ANTI-ALIENATION PROVISION.

The majority holds that statutory amendments enacted after *Guidry* but prior to *Jackson* constitute an exception to the *Guidry* principle. First, the MVRA requires that district

courts order restitution for victims in the case involving loss of property. *See* 18 U.S.C. §3663A(a)(1). Second, under 18 U.S.C. §3613(a), the "United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal Law or State Law." The provision takes effect "[n]otwithstanding any other Federal Law," *Id.*, and "all provisions of this section are available to the United States for the enforcement of an order of restitution." *Id.* at §(f).

This statutory scheme does not evidence a clear statement to abrogate ERISA's anti-alienation provision.[2] Although the statutory text does mandate restitution, it lacks any express statement (as it does for Social Security, *see* 18 U.S.C. §3613(a)), that restitution owed to victims can be collected from ERISA pensions.[3] Furthermore, there is nothing within ERISA calling for an exception for orders of restitution. Without an express directive in the restitution statute to seize ERISA pension funds or a specific carve-out within ERISA's anti-alienation provision, no court should create one through judicial fiat.

IV. CONTRARY TO THE DIRECTIVE OF *GUIDRY*, THE MAJORITY OPINION REPRESENTS A JUDICIALLY CREATED EXCEPTION TO A CONGRESSIONALLY REQUIRED ACT.

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[2] Neither does the legislative history of the MVRA support the majority's analysis. Although Congress recognized the importance of compensating victims for their losses, the history contains no mention of ERISA or a desire to undermine the anti-alienation provision or the Supreme Court's holding in *Guidry*.

[3] The majority notes that §3613 contains no exception for ERISA pension plans. However, the provision does not explicitly *include* it, either (as in the case of Social Security). It falls short of *Guidry's* requirement of an explicit statement abrogating the anti-alienation provision.

The MVRA determines a certain kind of penalty the government can enforce, but it does not resolve "the narrow question whether that judgment may be collected through a particular means — a [restitution order] placed *on the pension.*" *Guidry*, 493 U.S. at 376 (emphasis added). To create such an exception without clear intent is "especially problematic in the context of an anti garnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt." *Id.*

As our Supreme Court noted in *Guidry*, "[i]t is an elementary tenet of statutory construction that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.'" *Id.* at 375 (citing *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974)). Thus, unless and until Congress amends either the ERISA statute to explicitly provide an exception for restitution orders or the restitution statute to explicitly permit the seizure of ERISA pension assets, the general restitution statute cannot trump ERISA's more specific anti-alienation provision.

V. CONCLUSION.

If Congress intended to carve out a specific exception to ERISA's anti-alienation provision, it could and would have done so in the 16 years which followed *Guidry*. Congress certainly would have done so in 1997 when it specifically amended ERISA to permit garnishment of assets to satisfy a breach of trust to the plan. Congress refused to do so. As such the holdings of *Guidry* and *Jackson* remain controlling.

This Court's opinion in *Jackson*, decided after codification of the MVRA, cannot so easily be brushed aside. *Jackson* clearly holds that undistributed ERISA funds cannot be used

to make restitution payments unless, as per ERISA, the underlying crime involved the particular ERISA plan in question or the funds are sought to pay federal taxes.[4]

The majority sidesteps *Guidry's* requirement of a clear congressional statement to carve out exceptions to ERISA's anti-alienation provision and sets up irreconcilable conflict with *Jackson*.

Appellee respectfully submits that this case presents a compelling basis for rehearing en banc.

Dated: June 5, 2006

Respectfully submitted,

LAW OFFICES OF MARTIN S. BAKST

By: _____
MARTIN S. BAKST
Attorneys for Defendant-Appellee
Raymond P. Novak

[4] It is interesting to note that a state taxing authority remains unable to reach ERISA pension funds. From a social policy standpoint the majority opinion places the rights of an individual victim (here, a multi-national corporation) above those of a state taxing authority, who, arguably represents the interests of all citizens of the state.